

103^D CONGRESS
2^D SESSION

S. 2297

To facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis; and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 19 (legislative day, JULY 11), 1994

Mr. METZENBAUM (for himself, Mr. THURMOND, Mr. KENNEDY, Mr. BIDEN, Mr. LEAHY, Mr. SIMON, Mr. SIMPSON, and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis; and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “International Antitrust
5 Enforcement Assistance Act of 1994”.

1 **SEC. 2. DISCLOSURE TO A FOREIGN ANTITRUST AUTHOR-**
2 **ITY OF ANTITRUST EVIDENCE.**

3 Subject to section 8 and except as provided in section
4 5, the Attorney General of the United States and the Fed-
5 eral Trade Commission may provide, in accordance with
6 an antitrust mutual assistance agreement in effect with
7 a foreign antitrust authority, antitrust evidence to the for-
8 eign antitrust authority to assist the foreign antitrust au-
9 thority—

10 (1) to determine whether a person has violated
11 or is about to violate any of the foreign antitrust
12 laws administered or enforced by the foreign anti-
13 trust authority, or

14 (2) to enforce any of such foreign antitrust
15 laws.

16 **SEC. 3. INVESTIGATIONS TO ASSIST A FOREIGN ANTITRUST**
17 **AUTHORITY IN OBTAINING ANTITRUST EVI-**
18 **DENCE.**

19 (a) GENERAL AUTHORITY.—In accordance with an
20 antitrust mutual assistance agreement in effect with a for-
21 eign antitrust authority, subject to section 8, and except
22 as provided in section 5, the Attorney General may, using
23 the authority of the Attorney General to investigate pos-
24 sible violations of the Federal antitrust laws, conduct in-
25 vestigations to obtain antitrust evidence relating to a vio-
26 lation of the foreign antitrust laws administered or en-

1 forced by the foreign antitrust authority, and may provide
 2 such antitrust evidence to the foreign antitrust authority,
 3 to assist the foreign antitrust authority—

4 (1) to determine whether a person has violated
 5 or is about to violate any of such foreign antitrust
 6 laws, or

7 (2) to enforce any of such foreign antitrust
 8 laws.

9 Such investigations may be conducted, and such antitrust
 10 evidence may be provided, without regard to whether the
 11 conduct investigated violates any of the Federal antitrust
 12 laws.

13 (b) CONFORMING AMENDMENTS.—The Antitrust
 14 Civil Process Act (15 U.S.C. 1311 et seq) is amended—

15 (1) in section 2—

16 (A) in subsection (d)—

17 (i) by striking “or any” and inserting
 18 “, any”, and

19 (ii) by inserting before the period “,
 20 or any of the foreign antitrust laws”, and

21 (B) by adding at the end the following:

22 “(k) The term ‘foreign antitrust laws’ has the mean-
 23 ing given such term in section 12 of the International
 24 Antitrust Enforcement Assistance Act of 1994.”, and

25 (2) in the first sentence of section 3(a)—

(A) by inserting “or to an investigation authorized by section 3(a) of the International Antitrust Enforcement Assistance Act of 1994” after “investigation”, and

(B) by inserting “by the United States” after “proceeding”.

SEC. 4. JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES.

(a) AUTHORITY OF THE DISTRICT COURTS.—On the application of the Attorney General made in accordance with an antitrust mutual assistance agreement in effect with a foreign antitrust authority, the United States district court for the district in which a person resides, is found, or transacts business may order such person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist the foreign antitrust authority that is a party to such agreement—

(1) to determine whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) to enforce any of such foreign antitrust laws.

(b) CONTENTS OF ORDER.—(1) An order issued under subsection (a) may direct that testimony or a state-

1 ment be given, or a document or other thing be produced,
2 to a person who shall be recommended by the Attorney
3 General and appointed by the court. A person so appointed
4 shall have power to administer any necessary oath and to
5 take such testimony or such statement.

6 (2) An order issued under subsection (a) may pre-
7 scribe the practice and procedure for taking testimony and
8 statements. Such practice and procedure may be in whole
9 or in part the practice and procedure of the foreign state,
10 or the regional economic integration organization, rep-
11 resented by the foreign antitrust authority with respect
12 to which the Attorney General requests such order. To the
13 extent such order does not prescribe otherwise, any testi-
14 mony and statements required to be taken shall be taken,
15 and any documents and other things required to be pro-
16 duced shall be produced, in accordance with the Federal
17 Rules of Civil Procedure.

18 (c) RIGHTS AND PRIVILEGES PRESERVED.—A person
19 may not be compelled under an order issued under sub-
20 section (a) to give testimony or a statement, or to produce
21 a document or other thing, in violation of any legally appli-
22 cable right or privilege.

23 (d) VOLUNTARY CONDUCT.—This section does not
24 preclude a person in the United States from voluntarily
25 giving testimony or a statement, or producing a document

1 or other thing, in any manner acceptable to such person
2 for use in an investigation by a foreign antitrust authority.

3 **SEC. 5. LIMITATIONS ON AUTHORITY.**

4 Sections 2, 3, and 4 shall not apply with respect to
5 the following antitrust evidence:

6 (1) Antitrust evidence that is received by the
7 Attorney General or the Commission under section
8 7A of the Clayton Act (15 U.S.C. 18a), as added by
9 title II of the Hart-Scott-Rodino Antitrust Improve-
10 ments Act of 1976. Nothing in this paragraph shall
11 affect the ability of the Attorney General or the
12 Commission to disclose to a foreign antitrust author-
13 ity antitrust evidence that is obtained otherwise than
14 under such section 7A.

15 (2) Antitrust evidence that is matter occurring
16 before a grand jury and with respect to which disclo-
17 sure is prevented by Federal law, except that for
18 purposes of this section and Rule 6(e)(3)(c)(i) of the
19 Federal Rules of Criminal Procedure, a judicial pro-
20 ceeding includes a judicial or administrative proceed-
21 ing of a foreign state or a regional economic integra-
22 tion organization under any of the foreign antitrust
23 laws of such foreign state or such organization.

24 (3) Antitrust evidence that is specifically au-
25 thorized under criteria established by Executive

1 Order 12356, or any successor to such order, to be
 2 kept secret in the interest of national defense or for-
 3 eign policy, and—

4 (A) that is classified pursuant to such
 5 order or such successor, or

6 (B) with respect to which a determination
 7 of classification is pending under such order or
 8 such successor.

9 (4) Antitrust evidence that is classified under
 10 section 142 of the Atomic Energy Act of 1954 (42
 11 U.S.C. 2162).

12 **SEC. 6. DISCLOSURE OF ANTITRUST EVIDENCE OBTAINED**
 13 **UNDER THE ANTITRUST CIVIL PROCESS ACT.**

14 Section 4 of the Antitrust Civil Process Act (15
 15 U.S.C. 1313) shall not apply to prevent the Attorney Gen-
 16 eral from providing to a foreign antitrust authority anti-
 17 trust evidence in accordance with an antitrust mutual as-
 18 sistance agreement in effect under this Act and in accord-
 19 ance with the other requirements of this Act.

20 **SEC. 7. PUBLICATION REQUIREMENTS APPLICABLE TO**
 21 **ANTITRUST MUTUAL ASSISTANCE AGREE-**
 22 **MENTS.**

23 (a) PUBLICATION OF PROPOSED ANTITRUST MU-
 24 TUAL ASSISTANCE AGREEMENTS.—Not less than 45 days
 25 before entering into an antitrust mutual assistance agree-

1 ment and after consultation with the Commission, the At-
 2 torney General shall publish in the Federal Register—

3 (1) the proposed text of such agreement and
 4 any modification to such proposed text, and

5 (2) a request for public comment with respect
 6 to such text or such modification, as the case may
 7 be.

8 (b) PUBLICATION OF PROPOSED AMENDMENTS TO
 9 ANTITRUST MUTUAL ASSISTANCE AGREEMENTS IN EF-
 10 FECT.—Not less than 45 days before entering into an
 11 agreement that makes an amendment to an antitrust mu-
 12 tual assistance agreement in effect under this Act and
 13 after consultation with the Commission, the Attorney Gen-
 14 eral shall publish in the Federal Register—

15 (1) the proposed text of such amendment, and

16 (2) a request for public comment with respect
 17 to such amendment.

18 (c) PUBLICATION OF ANTITRUST MUTUAL ASSIST-
 19 ANCE AGREEMENTS ENTERED INTO AND OF AMEND-
 20 MENTS TO SUCH AGREEMENTS.—Not later than 30 days
 21 after entering into an antitrust mutual assistance agree-
 22 ment, or an agreement that makes an amendment to an
 23 antitrust mutual assistance agreement in effect under this
 24 Act, the Attorney General shall publish in the Federal
 25 Register—

1 (1) the text of the antitrust mutual assistance
2 agreement or of such amendment, as the case may
3 be, and

4 (2) in the case of an agreement that makes
5 such amendment, a notice containing—

6 (A) a statement of the fact that such
7 agreement was entered into,

8 (B) citations to the provisions of the Fed-
9 eral Register that contain the text of the
10 amendment and of the antitrust mutual assist-
11 ance agreement that is so amended, and

12 (C) a description of the manner in which
13 a copy of the antitrust mutual assistance agree-
14 ment, as so amended, may be obtained from the
15 Attorney General.

16 (d) CONDITION FOR VALIDITY.—An antitrust mutual
17 assistance agreement, or an agreement that makes an
18 amendment to an antitrust mutual assistance agreement,
19 entered into in violation of subsection (a) or (b) shall not
20 be considered to be entered into under the authority of
21 this Act.

22 **SEC. 8. IMPLEMENTATION OF ANTITRUST MUTUAL ASSIST-**
23 **ANCE AGREEMENTS.**

24 (a) DETERMINATIONS.—The Attorney General may
25 conduct an investigation under section 3, and the Attorney

1 General or the Commission may provide antitrust evidence
2 to a foreign antitrust authority, under an antitrust mutual
3 assistance agreement in effect under this Act only if the
4 Attorney General or the Commission, as the case may be,
5 determines in the particular instance in which such inves-
6 tigation or evidence is requested that—

7 (1) the foreign antitrust authority—

8 (A) will satisfy the assurances, terms, and
9 conditions required by subparagraphs (A), (B),
10 and (D) of section 12(2), and

11 (B) is capable of complying with and will
12 comply with the confidentiality requirements
13 applicable under such agreement to the re-
14 quested antitrust evidence,

15 (2) providing the requested antitrust evidence
16 will not violate section 5, and

17 (3) conducting such investigation, or providing
18 the requested antitrust evidence, as the case may be,
19 is consistent with the public interest of the United
20 States, taking into consideration, among other fac-
21 tors, whether the foreign state, or the regional eco-
22 nomic integration organization, represented by the
23 foreign antitrust authority holds any proprietary in-
24 terest that could benefit or otherwise be affected by

1 such investigation or by the provision of such anti-
2 trust evidence.

3 (b) LIMITATION ON DISCLOSURE OF CERTAIN ANTI-
4 TRUST EVIDENCE.—Neither the Attorney General nor the
5 Commission may disclose in violation of an antitrust mu-
6 tual assistance agreement any antitrust evidence received
7 under such agreement, except that such agreement may
8 not prevent the disclosure of such antitrust evidence to
9 a defendant in an action or proceeding brought by the At-
10 torney General or the Commission for a violation of any
11 of the Federal antitrust laws if such disclosure would oth-
12 erwise be required by Federal law.

13 (c) REQUIRED DISCLOSURE OF NOTICE RE-
14 CEIVED.—If the Attorney General or the Commission re-
15 ceives a notice described in section 12(2)(G), the Attorney
16 General or the Commission, as the case may be, shall
17 transmit such notice to the person that provided the evi-
18 dence with respect to which such notice is received.

19 **SEC. 9. LIMITATIONS ON JUDICIAL REVIEW**

20 (a) DETERMINATIONS.—Determinations made under
21 section 8(a) shall not be subject to judicial review.

22 (b) CITATIONS TO AND DESCRIPTIONS OF ANTI-
23 TRUST LAWS.—Whether an antitrust mutual assistance
24 agreement satisfies the requirements specified in section
25 12(2)(C) shall not be subject to judicial review.

1 **SEC. 10. SUPPLEMENTATION AND PRESERVATION OF AU-**
2 **THORITY.**

3 (a) SUPPLEMENTAL AUTHORITY.—The authority
4 provided by this Act is in addition to, and not in lieu of,
5 any other authority vested in the Attorney General, the
6 Commission, or any other officer of the United States.

7 (b) AUTHORITY PRESERVED.—This Act does not
8 modify or affect the allocation of responsibility between
9 the Attorney General and the Commission for the enforce-
10 ment of the Federal antitrust laws.

11 **SEC. 11. REPORT TO THE CONGRESS.**

12 In the 30-day period beginning 3 years after the date
13 of the enactment of this Act and after consultation with
14 the Commission, the Attorney General shall submit, to the
15 Speaker of the House of Representatives and the Presi-
16 dent pro tempore of the Senate, a report—

17 (1) describing how the operation of this Act has
18 affected the enforcement of the Federal antitrust
19 laws,

20 (2) the extent to which foreign antitrust au-
21 thorities have complied with the confidentiality re-
22 quirements applicable under antitrust mutual assist-
23 ance agreements in effect under this Act,

24 (3) the number and identities of the foreign
25 antitrust authorities that have entered into such
26 agreements,

1 (4) the identity of each foreign state, and each
2 regional economic integration organization, that has
3 in effect a law similar to this Act,

4 (5) the approximate number of requests made
5 by the Attorney General and the Commission under
6 such agreements to foreign antitrust authorities for
7 antitrust investigations and for antitrust evidence,

8 (6) the approximate number of requests made
9 by foreign antitrust authorities under such agree-
10 ments to the Attorney General and the Commission
11 for investigations under section 3 and for antitrust
12 evidence, and

13 (7) a description of any significant problems or
14 concerns of which the Attorney General is aware
15 with respect to the operation of this Act.

16 **SEC. 12. DEFINITIONS.**

17 For purposes of this Act:

18 (1) The term “antitrust evidence” means infor-
19 mation, testimony, statements, documents, or other
20 things obtained in anticipation of, or during the
21 course of, an investigation or proceeding under any
22 of the Federal antitrust laws or any of the foreign
23 antitrust laws.

24 (2) The term “antitrust mutual assistance
25 agreement” means a written agreement, or written

1 memorandum of understanding, that is entered be-
2 tween the Attorney General and a foreign antitrust
3 authority for the purpose of conducting investiga-
4 tions under section 3, or for providing antitrust evi-
5 dence, on a reciprocal basis and that includes the
6 following:

7 (A) An assurance that the foreign anti-
8 trust authority will provide to the Attorney
9 General or the Commission assistance that is
10 comparable in scope to the assistance the Attor-
11 ney General or the Commission, as the case
12 may be, provides under such agreement or such
13 memorandum.

14 (B) An assurance that the foreign anti-
15 trust authority is subject to laws and proce-
16 dures that are adequate to maintain the con-
17 fidentiality of antitrust evidence that may be re-
18 ceived under section 2, 3, or 4 and will give
19 protection to antitrust evidence received under
20 such section that is not less than the protection
21 provided under the laws of the United States to
22 such antitrust evidence.

23 (C) Citations to, and brief descriptions of,
24 the laws (including treaties, statutes, executive
25 orders, and regulations) of the United States,

1 and the laws (including treaties, statutes, execu-
2 tive orders, and regulations) of the foreign
3 state, or the regional economic integration orga-
4 nization, represented by the foreign antitrust
5 authority, that protect the confidentiality of
6 antitrust evidence that may be provided under
7 such agreement or such memorandum. Such ci-
8 tations and such descriptions shall include the
9 enforcement mechanisms and penalties applica-
10 ble under such laws.

11 (D) Terms and conditions that specifically
12 prohibit using antitrust evidence received under
13 such agreement or such memorandum, for any
14 purpose other than the administration or en-
15 forcement of the foreign antitrust laws involved.

16 (E) An assurance that antitrust evidence
17 received under section 2, 3, or 4 from the At-
18 torney General or the Commission, and all cop-
19 ies of such evidence, in the possession or control
20 of the foreign antitrust authority will be re-
21 turned to the Attorney General or the Commis-
22 sion, respectively, at the conclusion of the for-
23 eign investigation or proceeding with respect to
24 which such evidence was so received.

1 (F) Terms and conditions that specifically
2 provide that such agreement or such memoran-
3 dum will be terminated if—

4 (i) the confidentiality required under
5 such agreement or such memorandum is
6 violated with respect to antitrust evidence,
7 and

8 (ii) adequate action is not taken both
9 to minimize any harm resulting from the
10 violation and to ensure that such confiden-
11 tiality is not violated again.

12 (G) Terms and conditions that specifically
13 provide that if the confidentiality required
14 under such agreement or such memorandum is
15 violated by the foreign antitrust authority with
16 respect to antitrust evidence, notice of the viola-
17 tion will be given—

18 (i) by the foreign antitrust authority
19 promptly to the Attorney General or the
20 Commission with respect to antitrust evi-
21 dence provided by the Attorney General or
22 the Commission, respectively, and

23 (ii) by the Attorney General or the
24 Commission to the person (if any) that

1 provided such evidence to the Attorney
2 General or the Commission.

3 (3) The term “Attorney General” means the
4 Attorney General of the United States.

5 (4) The term “Commission” means the Federal
6 Trade Commission.

7 (5) The term “Federal antitrust laws” has the
8 meaning given the term “antitrust laws” in sub-
9 section (a) of the first section of the Clayton Act (15
10 U.S.C. 12(a)) but also includes section 5 of the Fed-
11 eral Trade Commission Act (15 U.S.C. 45) to the
12 extent that such section 5 applies to unfair methods
13 of competition.

14 (6) The term “foreign antitrust authority”
15 means a governmental entity of a foreign state or of
16 a regional economic integration organization that is
17 vested by such state or such organization with au-
18 thority to enforce the foreign antitrust laws of such
19 state or such organization.

20 (7) The term “foreign antitrust laws” means
21 the laws of a foreign state, or of a regional economic
22 integration organization, that are substantially simi-
23 lar to any of the Federal antitrust laws and that
24 prohibit conduct similar to conduct prohibited under
25 the Federal antitrust laws.

1 (8) The term “person” has the meaning given
2 such term in subsection (a) of the first section of the
3 Clayton Act (15 U.S.C. 12(a)).

4 (9) The term “regional economic integration or-
5 ganization” means an organization that is con-
6 stituted by, and composed of, foreign states and in
7 which such foreign states have vested authority to
8 make decisions binding on such foreign states.

9 **SEC. 13. AUTHORITY TO RECEIVE REIMBURSEMENTS.**

10 The Attorney General and the Commission are au-
11 thorized to receive from a foreign state or a regional eco-
12 nomic integration organization reimbursement in cash or
13 in kind for the costs incurred by the Attorney General or
14 the Commission, respectively, to conduct investigations
15 under section 3 or provide antitrust evidence under a mu-
16 tual assistance agreement entered into with the foreign
17 antitrust authority that represents such foreign state or
18 such organization.

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